PP

v.

RAJAN SINNIAH

HIGH COURT MALAYA, SHAH ALAM
NALLINI PATHMANATHAN JC
[CRIMINAL APPEAL NO: 42-54-2006]
18 MAY 2007

CRIMINAL LAW: *Penal Code - Section 376 - Appeal against conviction and sentence - Rape of minor - Evidence of victim - Whether fraught with factual inconsistencies and inaccuracies - Whether could be relied upon as basis for conviction - Corroboration - Whether victim's evidence corroborated by other witnesses for the prosecution - Differences in victim's testimony in court and in first information report - Whether there was an attempt to explain the differences - Failure of sessions court judge to consider or address the substantive inconsistencies in the evidence - Whether warranted a consideration of whether an error of law had been occasioned resulting in substantial miscarriage of justice - Failure to call chemist as witness - Whether prosecution discharged its burden of proof - Whether s. 114(g) of the Evidence Act 1950 should be invoked - Failure to produce chemical report - Whether fatal to prosecution's case - Whether victim's evidence inherently flawed - Whether finding of guilt and conviction of accused by trial judge wrong*

EVIDENCE*: Corroboration - Credibility and corroboration - Whether satisfied - Whether victim's evidence corroborated by other witnesses for the prosecution - Lack of corroboration - Uncertainty as to the identity of the assailant - Whether there was sufficient basis to conclude victim's evidence differed in material and relevant particulars - Failure of sessions court judge to consider or address the substantive inconsistencies in the evidence - Whether warranted a consideration of whether an error of law had been occasioned*

EVIDENCE: *Documentary evidence - First information report - Differences in victim's testimony in court and in first information report - Whether there was an attempt to explain the differences - Failure of sessions court judge to consider or address the substantive inconsistencies in the evidence - Whether warranted a consideration of whether an error of law had been occasioned resulting in substantial miscarriage of justice*

EVIDENCE: *Expert evidence - Evidence of chemist - Whether forensic chemical report of considerable significance - Failure to call chemist as witness - Whether prosecution discharged its burden of proof - Whether s. 114(g) of the Evidence Act 1950 should be invoked - Whether fatal to prosecution's case*

The accused was tried in the sessions court for raping a female, aged 13 years, thereby committing an offence under s. 376 of the Penal Code punishable under the same section. The accused was found guilty and convicted and was sentenced to a term of imprisonment of fifteen years' and five strokes of whipping. The accused thus appealed against the conviction and sentence. The following issues arose for consideration: (a) whether the victim's own evidence was fraught with factual inaccuracies and inconsistencies and could not be relied upon to find a basis for a conviction; (b) whether the victim's evidence was corroborated by the evidence of other witnesses called for the prosecution; (c) whether the prosecution had failed to produce the forensic chemical analysis report which had been conducted, thereby warranting an adverse inference under s. 114(g) of the Evidence Act 1950 being invoked against the prosecution and (d) whether the evidence of the investigating officer, SP9, that the results of such forensic analysis were negative gave rise to a real possibility that a third party and not the accused had perpetrated the offence.

Held (acquitting and discharging the accused):

(1) The victim of this alleged rape was SP4. SP4's certainty that it was the accused who had raped her was considerably diminished after cross examination. Her evidence was clear that she was not certain of the identity of the assailant as she had only seen his face from the nose downwards. Her uncertainty as to the identity of her assailant was not explained during the course of re-examination. The answers given by SP4 in respect of the identity of her assailant in cross examination were not therefore subjected to a proper re-examination. There was a failure to address or procure an explanation or clarify SP4's clear responses in cross-examination that she did not see the entire face of her assailant and that she could not therefore be sure that it was the accused who was her assailant that night. (paras 10, 11, 12, 13 & 14)

(2) SP4's former statement in the police report did not corroborate or lend weight to SP4's evidence but contained a different version of events leading up to the alleged rape. In view of the lack of corroboration of SP4's testimony in court in the police report, coupled with her uncertainty as to the identity of her assailant in cross-examination there was sufficient basis to conclude that her evidence differed in material and relevant particulars. These could not be dismissed as 'fanciful doubts.' There were a sufficient number of facts which were at variance. (para 21)

(3) The testimony of SP4, on whom the greater part of the prosecution case rested upon, related two substantially different versions of the same event. It was not an instance of SP4 forgetting and failing to recall certain events. There were more details in her testimony in court than in her first information report. The two versions had very little in common. No attempt was made to explain the differences. (para 24)

(4) The sessions court judge did not consider or evaluate the differences in SP4's evidence at all. She had adopted in *toto* SP4's testimony during examination in chief and did not evaluate it against SP4's responses in cross-examination and re-examination. Neither was SP4's responses subjected to evaluation in the form of corroboration *vide* the earlier statements of SP4 or as against the evidence of other witnesses. The issue of SP4's credibility was not addressed in her grounds of judgment. The sessions court judge had chosen to accept SP4's assertion that her evidence in court was the 'correct' version of events. However, it was the failure to consider or address these substantive inconsistencies in the evidence that warranted a consideration of whether an error of law had been occasioned resulting in a substantial miscarriage of justice in convicting the accused on the flawed evidence of SP4. The failure of the sessions court judge to address her mind to the anomalies in the evidence of the chief prosecution witness, SP4, coloured her approach to the issue of the credibility of this witness. (paras 28, 29 & 30)

(5) SP8, who was with SP4 on the night of the alleged rape, gave evidence that did not corroborate SP4's evidence in respect of the rape, or even any form of abduction that night, *albeit* by the accused or anyone else. He did not recall the presence of any third person. The inconsistencies in SP4's evidence in relation to the location and nature of the events prior to the rape, the kicking of her bicycle and her abduction by the unknown third man remained unresolved. In conclusion therefore, on the issue of corroboration of SP4's evidence by independent witnesses, neither one of them were able to corroborate SP4's evidence/claim that she was raped by the accused. (paras 37 & 38)

(6) According to SP9, the results of the forensic analysis were negative. By clarifying that negative meant there was no match between the vaginal swab taken from SP4 and the accused's blood sample, a very real possibility arose that there could have been a match with some person other than the accused. Despite SP4's allegation that the accused had raped her in the manner described in her evidence, no DNA of the accused was found on or in SP4. (para 53)

(7) This forensic chemical report was of considerable significance because it could have either corroborated the evidence of SP4 or shown whether the accused or an unknown third party was involved. The report in this case could have easily been produced. If the chemist had been called, his evidence may have either confirmed the accused as SP4's assailant, or would have thrown doubt on the role allegedly played by the accused in the incident. Unfortunately the chemist was not called as a witness. This court was of the view that he ought to have been called to enable the prosecution to make out its case. Merely offering him to the defence left gaps in the prosecution case. The attendant result was that it could not be said that the prosecution had discharged its burden of proof. Section 114(g) of the Evidence Act 1950 should, in these circumstances, have been drawn. The failure to do so was an error of law that had occasioned a miscarriage of justice. As a consequence of the failure to produce this wholly relevant evidence, the issue of whether the accused raped SP4 remained unsolved. The failure to produce the report was fatal to the prosecution's case. (paras 55 & 56)

(8) There were so many contradictions and unanswered queries, that on a consideration of the totality of the evidence, one was left with doubt as to where the truth of the matter lay. The evidence of the complainant, SP4, could not be described as 'credible.' As the credibility of SP4 was not reinforced by the other evidence made available by the prosecution, her testimony ought, with respect, to have been rejected by the trial judge. Her failure to do so warranted interference by this court. (para 59)

(9) It was unsafe to act on SP4's evidence which was inherently flawed. The other witnesses called to corroborate her evidence did not corroborate the fact that she was raped by the accused. In this respect, the failure to produce the forensic chemical analysis was fatal to the prosecution's case. The accused in his defence did not forward a ritualistic 'bare denial' but set forth his own version of events that required mature and unbiased consideration and evaluation. The finding of guilt and the conviction of the accused by the trial judge was wrong, thus the order made by her was set aside. (paras 70 & 71)

Case(s) referred to:
Ab Malek Atan v. PP [2002] 6 CLJ 405 HC ***(refd)***
Aziz Muhammad Din v. PP [1997] 1 CLJ Supp 523 HC ***(refd)***
Lee Kwai Heong & Anor v. PP [2006] 1 CLJ 1043 CA ***(refd)***
Looi Kow Chai v. PP [2003] 1 CLJ 734 CA ***(refd)***
Mohamed Kasdi v. PP [1969] 1 MLJ 135 ***(refd)***
Nasrul Annuar Abd Samad v. PP [2005] 1 CLJ 193 HC ***(refd)***
Pie Bin Chin v. PP [1985] 1 MLJ 234 ***(refd)***
PP v. Wan Razalli Kassim [1970] 2 MLJ 79 ***(refd)***
Sabarudin Non & Ors v. PP [2005] 1 CLJ 466 CA ***(refd)***
Tengku Mahmood v. PP [1974] 1 MLJ 110 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 8(j), 114(g), 157

Other source(s) referred to:
Sarkar on Evidence, 15th edn, p 99

For the accused - Encik Vengatram; M/s Jeyaratnam & Co
For the prosecution - Tuan Azar Irwan DPP

Reported by Suhainah Wahiduddin

A

JUDGMENT

Nallini Pathmanathan JC:

Introduction

B **[1]** The accused who is the appellant in this appeal, was tried in the Sessions Court in Shah Alam on the following charge:

> Bahawa kamu pada 16-8-2002 di antara jam 7.30 malam hingga 0030 pagi 17-8-2002 di Ladang Kelapa Sawit Bukit Asa Hulu Bernam, di dalam Daerah Hulu Selangor telah merogol seorang
C perempuan nama Ng Siau Yan kpt: 890718-08-5072 berumur 13 tahun, oleh itu kamu telah melakukan satu kesalahan di bawah seksyen 376 Kanun Keseksaan dan boleh dihukum di bawah peruntukan seksyen yang sama.

D **[2]** The English translation of the charge reads as follows:

> That you, on the 16 August 2002 between 7.30 p.m. and 0030 in the morning of 17 August 2002, in Ladang Kelapa Sawit Bukit Asa Hulu Bemam, in the district of Hulu Selangor raped a female named Ng Siau Yan kpt: 890718-08-5072 aged 13 years, and
E thereby committed an offence under s. 376 of the Penal Code punishable under the same section.

[3] The accused claimed trial to the charge. The prosecution called nine witnesses in support of its case. Defence was called
F and the accused elected to give evidence. He did not call any other witnesses. He was found guilty and convicted. The sentence imposed on him was a term of imprisonment of fifteen years' and five strokes of whipping. He now appeals against the conviction and sentence.

G **[4]** The victim/complainant of the alleged rape, SP4 was born on 18 July 1989 according to her birth certificate, exh. P6. She was aged 13 years and one month on 16 August 2002, and no question of her consent arises on the alleged facts.

H

Appeal

[5] The petition of appeal contains no less than 12 grounds but at the hearing of the appeal counsel for the accused abridged these grounds and the following issues arose for consideration:

I (a) The victim's own evidence was fraught with factual inaccuracies and inconsistencies and could not be relied upon to found the basis for a conviction;

(b) The victim's evidence was not corroborated by the evidence of other witnesses called for the prosecution;

(c) The prosecution had failed to produce the forensic chemical analysis report which had been conducted, thereby warranting an adverse inference under s. 114(g) of the Evidence Act 1950 being invoked against the prosecution;

(d) The evidence of the Investigating Officer, SP9 that the results of such forensic analysis were negative gave rise to a real possibility that a third party and not the accused had perpetrated the offence.

The Evidence Of The Complainant Relating To The Alleged Rape

[6] The victim of this alleged rape is one Ng Siau Van ('SP4'), a young girl of Indian origin who had been adopted by a Chinese family. SP4's evidence in court was that on 16 August 2002 at about two in the afternoon she went to visit a friend called Haridas in Hulu Bernam near Kampung Hassan. She was accompanied by a male friend, called Samy, SP8. She rode a bicycle and Samy rode a motorcycle. Samy and she remained in Haridas's house until about 10pm that night. After this she left Haridas's house with Samy, had a meal with him along the highway and then made her way home with Samy. On her journey home they went past, what is described in her evidence as "kampong B". The location of "kampong B" was not clarified further either by prosecution or defence. It would appear that they were proceeding along the highway. SP4 testified that she then heard someone calling her name. Samy and she proceeded on their journey without stopping. She did not know who had called out her name. Next, someone kicked her bicycle. Simultaneously Samy was beaten/hit. He left the scene. Then one of the men dragged her along down a smaller road for a distance of about two and a half metres and into an oil palm plantation. This is what SP4 said:

> ... Orang yang tendang basikal saya telah pukul Samy dan Samy balik selepas itu dan tank saya tua sikit, sederhana. Orang yang tendang basikal dan tarik saya berlainan, iaitu 2 orang berlainan ...

[7] Exhibit P1D is a photograph that shows that an oil palm plantation abutted the highway. SP4 marked as 'X' the location at which her bicycle was kicked. 'X' is opposite some shops on the other side of the highway.

[8] SP4 then gave evidence that both the men undressed her. After this, the older of the two men ran away, leaving the accused alone with SP4. SP4 maintained in examination in chief that she saw the accused and had seen him previously on seven or eight occasions prior to that night. SP4 went on to state that the accused hit her face and hands and then raped her. He then got dressed and left her. She put on her clothes and went to look for her bicycle which she found near a Hindu temple. As she was collecting it, the accused came to her again and warned her not to make a report, otherwise he would hit her. She then sat outside a closed shop throughout the night until morning. In the morning she went to see Samy and informed him that the accused had raped her. The accused was Samy's elder cousin. Samy told her that she had to report the incident to the police. She duly did so, with Samy escorting her to the door of the police station.

Evidence Of SP4 During Cross-examination

[9] In the course of cross-examination, SP4 said that the place where the incident took place was dark. There was only a street lamp across the road, near where her bicycle had been kicked but no light beyond that. She agreed that she only saw a part of her assailant's face from nose downwards. She recalled that he had a moustache but no beard. Her evidence on the issue of the identity of the assailant during cross-examination was as follows:

> ... Saya nampak sikit muka dia dan hidungnya. Saya nampak daripada hidung ke bawah.
>
> Soalan: Saya cadangkan awak nampak bahagian hidung bawah.
>
> Jawapan: Setuju.
>
> Jawapan: Setuju tidak nampak matanya.
>
> Saya ingat dia ada sedikit misai. Pasti ada misai. Tak nampak samada dia ada janggut.
>
> Soalan: Setuju sebab awak nampak belah bawah daripada bahagian hidung ke bawah, awak tidak cam mukanya.
>
> Jawapan: Setuju.
>
> Soalan: Setuju kerana tidak nampak mukanya sama sekali, awak tidak pasti dia adalah orang dalam mahkamah.
>
> Jawapan: Saya pasti dia orang yang ada di mahkamah. Saya tahu memang dia.

Soalan: Walaupun tidak nampak mukanya keseluruhan, awak masih pasti dia adalah orang yang berada di mahkamah hari ini.

Jawapan: Kalau tak nampak tak pasti.

Soalan: Orang yang duduk atas kamu, kamu nampak bahagian hidung ke bawah, bagaimana awak pasti orang itu orang yang berada di mahkamah hari ini.

Jawapan: Tak pasti.

Soalan: Saya cadangkan orang yang duduk atas kamu pada malam itu boleh jadi orang lain.

Jawapan: Tak setuju.

Soalan: Bagaimana tak setuju?

Jawapan: Saya memang tahu. Pada malam kejadian saya takut banyak.

Soalan: Setuju kerana terlalu takut banyak kamu tidak ingat apa yang terjadi pada malam itu.

Jawapan: Setuju.

Soalan: Setuju kerana terlalu takut, kamu tidak pasti apa yang kamu nampak atau tidak nampak pada malam itu.

Jawapan: Setuju.

[10] It is apparent that SP4's certainty that it was the accused who had raped her was considerably diminished after cross-examination. In fact her evidence is clear that she was not certain of the identity of the assailant as she had only seen his face from nose downwards.

[11] This portion of her evidence in cross-examination had followed from her evidence that the assailant had, while lying on her body, held a lighter in one hand. As a consequence she was able to see her assailant in this limited lighting from nose downwards. This is what she said in cross-examination:

> ... Tangan dia pegang kemaluan dia dan satu lagi tangan pegang lighter ... Dia pegang lighter dan tunjuk kemaluannya dan saya nampak kemaluannya. Lighter di pegang jauh sedikit daripada kemaluannya. Saya nampak sikit muka dia dan hidung nya. Saya nampak daripada hidung ke bawah ...

Re-examination: Were The Issues Raised In Cross-examination Adequately Explained?

[12] Her uncertainty as to the identity of her assailant was not explained during the course of re-examination. The only statement SP4 made in re-examination was that she knew the accused because she had seen him before in the Hindu temple. She said:

> ... Kenal OKT kerana penah tengok beliau di Kuil India. Saya punya makcik rumahnya belakang Kuil dan saya nampaknya di Kuil. Saya boleh cam OKT walaupun gelap ...

[13] The answers given by SP4 in respect of the identity of her assailant in cross-examination were not therefore subjected to a proper re-examination. In *Nasrul Annuar Abd Samad v. PP* [2005] 1 CLJ 193 Augustine Paul JCA (as His Lordship then was) stated as follows:

> ... The uncertainties in the answers given by her were not subjected to a proper re-examination. The object of this examination is to give an opportunity to a witness to explain any part of his evidence given in cross-examination which is capable of being construed unfavourably (see *Law of Evidence* by Woodroffe & Amir Ali 16th edn. Vol 4 p 3623). In view of the vague evidence of PW3 as shown in her cross-examination which has not been effectively explained in her re-examination it is unsafe to rely on her evidence ...

[14] There was therefore a failure to address or procure an explanation or clarify SP4's clear responses in cross-examination that she did not see the entire face of her assailant and that she could not therefore be sure that it was the accused who was her assailant that night.

SP4's Earlier Statement In Her Complaint Dated 17 August 2002 (exh. P4A) – Does It Corroborate Her Evidence In Court?

[15] The most contemporaneous report made by SP4 of the incident is her complaint to the police that is contained in exh. P4A, namely police report no. 334/2002 dated 17 August 2002 at 21.45 hrs ('the police report'). It was made almost twenty-hours after the event.

[16] By virtue of s. 8(j) of the Evidence Act 1950 this complaint in P4A is relevant admissible evidence. The section provides:

The question is whether A was ravished.

The facts that shortly after the alleged rape she made a complaint relating to the crime, the circumstances under which and the terms in which the complaint was made are relevant ...

[17] Additionally s. 157 of the Evidence Act 1950 provides that such a former statement may be proved to corroborate SP4's later testimony as to the same fact, in this case, of rape. It provides:

In order to corroborate the testimony of a witness, any former statement made by him whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved ...

The Significance Of The Police Report, P4A

[18] This issue was discussed in some depth in *Lee Kwai Heong & Anor. v. PP* [2006] 1 CLJ 1043 where Richard Malanjum JCA (as His Lordship then was) delivered the decision of the Court of Appeal:

... it is settled law that a first information report is not a substantive piece of evidence. Its evidential value 'is only to contradict the testimony of a witness under s. 145 of the Evidence Act 1950 or to corroborate his testimony under s. 157 of the said Act the operation of which is as explained in *Lim Guan Eng v. PP* [2000] 2 MLJ 577. It is not substantive evidence of its contents but merely of corroborative value. (See: *Balachandran v. Public Prosecutor* [2005] 2 MLJ 301). As such it would not be in accordance with the settled principle if the evidence of PW7 in court should be considered unreliable by reason of him failing to include the names of the appellants when he lodged exh. P24 ...

As to the effect of omission in a first information report the then Federal Court in *Herchun Singh v. Public Prosecutor (supra)* spelt out the answer in this fashion at p. 211:

As regards omissions in the first information report, we would endorse Sohoni's commentary on s. 154 of the Indian Criminal Procedure Code which is similar to s. 107 of our Criminal Procedure Code, as follows:

It is a mistake to believe that a person cannot be the accused unless his name appears in the first information report. The provisions of the Code lay down no such stipulation. All that is required for purpose of this section is that there should be clear,

A definite information about the commission of a cognizable offence to set the investigation machinery in motion. Further the information required need not contain the circumstances of the commission of the offence, nor the names of the offenders or the witnesses for the main purpose of investigation is to ascertain these matters ... *The first information report is not an Encyclopedia. It is not the beginning and ending of every case. It is only a complaint to set the affairs of law and order in motion. It is only at the investigation stage that all the details can be gathered and filled up. But it cannot be said that omissions in the first information report would always be of no significance. The report is not substantive evidence and omissions in it will not ipso facto lead to the case being thrown out. But it is a piece of corroborative evidence; omissions in it will, other things being the same, deprive the prosecution of the most valuable corroboration and thereby make the story suspicious.*

When a first information report contains an omission as to an important fact relied upon by the prosecution, the omission is important and in the absence of any other evidence, the court may in a given case refuse to consider the evidence of the information on that fact because of such omission for a correct appraisal of the effect of omission as contradicting the informant it is essential to keep in view the circumstances in which the report was lodged ...

In short, it is wrong to hold up the first information report as a sure touchstone by which the complainant's credit may invariably be impeached. It can only be used for that purpose with discrimination, in much the same way as previous statements by the witness are used, so that irrelevant errors in detail are not given exaggerated importance, nor omissions, objectively considered in the light of surrounding circumstances.

[19] The police report is therefore primarily of corroborative value. It has to be viewed in the context of whether it corroborates SP4's testimony. Additionally omissions in this statement are not fatal but would deprive the prosecution of most valuable corroborative evidence, thus throwing doubt and suspicion on SP4's story. Bearing this summarization of the law in mind, the contents of the police report are considered next in the context of SP4's testimony in court. The contents of the police report are best set out in toto:

... Pada jam 1400 hrs. 16 August 2002 saya keluar dari rumah dengan naiki basikal; mahu pergi ke rumah kawan saya di Jalan Eskot, selepas itu saya pada jam 1930 hrs 16 August 2002 saya mahu balik ke rumah melalui jalan Dato' Ramli. Apabila sampai di hadapan Padang Bola Hulu Bemam saya telah di tahan oleh

seorang lelaki India nama panggilan Machan dan paksa saya ikut dengannya. Sampai di tepi Lebuh Raya saya telah diheret bawa masuk ke dalam ladang Kelapa Sawit dekat Bukit Asa. Kedua-dua lelaki tersebut bawa saya keladang tersebut tetapi salah seorang telah pulang. Selepas itu dia telah buka baju saya hingga bogel. Disitu dia telah rogol saya dan dia bagitahu jika tiada keluar air saya tidak akan lepaskan awak. Saya takut dan meronta-ronta tapi dia pukul saya dan cakar-cakar ditangan saya. Saya juga mendapat luka sedikit. Selepas jam 12.30 pagi 17 August 2002 saya dan dia keluar dari ladang dan dia suruh saya ikut dia tapi saya berhenti di kedai makan Kg. Hassan duduk di situ sampai pagi ...

[20] SP4's evidence in the police report and in court is at variance, and these differences are enumerated below:

(i) There is no mention of Samy in the police report, while in SP4's evidence in court, Samy plays a significant role. In her evidence in court, SP4 stated that she went to visit a friend on the afternoon of 16 August 2002 on her bicycle, accompanied by Samy on his motorcycle and accompanied by him on the way home likewise.

(ii) In the police report SP4 says that she was detained by a man known to her as "Machan" in front of a football field and forced to follow him to the highway and then taken into an oil palm plantation. In court however, SP4 maintains that she was going home with Samy, taking a shortcut through 'kampung b'. She was riding her bicycle and Samy his motorcycle, when along the way they were accosted by the accused, who hit Samy while simultaneously, another man kicked her bicycle and dragged her into the plantation.

There appear to be two versions of the events leading up to how she was accosted and dragged into the oil palm plantation in evidence;

(iii) In the police report SP4 states that she was accosted and detained by a man known as "Machan". There was no attempt by either prosecution or defence to correlate "Machan" in P4A with the accused. It would appear that it was assumed that "Machan" referred to the accused, as he had been identified by SP4 as the assailant;

(iv) Similarly there was no explanation as to the difference in the route taken by SP4 on her way home. In the police report, SP4 says she was stopped in front of the "Padang Bola Hulu Bernam". In her testimony in court, SP4 says she was taking a shortcut through Kampung B, possibly Kampung Hassan, and was riding along the highway when her bicycle was kicked and Samy hit.

(v) The times at which these events took place appear to vary by some hours. In the police report, SP4 says that she was coming home at around 7.30 in the evening, while in her evidence in court, she says Samy and she were returning home after 10pm;

(vi) In the police report there is initially no mention of two men. The second man only appears when SP4 is "dragged" into the plantation. In her version in court however, SP4 is clear that there were two men at the outset, one who kicked her bicycle and dragged her into the plantation, and the other, the accused, who hif Samy.

By contrast in her police report it is suggested that "machan" dragged her into the plantation while in her evidence in court, it is the other unknown man who drags her into the plantation. The identity of this "unknown man" remains a mystery.

(vii) SP4's bicycle according to her evidence in court, was kicked while she was riding along the highway. After she had been raped however, she says that she left the plantation and found the bicycle near a Hindu temple. It is not clear how the bicycle made its way to the Hindu temple and where the temple is in relation to the highway where she claims to have been accosted together with Samy;

[21] From the foregoing it is evident that SP4's former statement in the police report does not corroborate or lend weight to SP4's evidence but contains a different version of events leading up to the alleged rape. The first issue in this appeal is that the evidence of SP4 is "fraught with inaccuracies and inconsistencies" and could not be relied upon to found the basis for a conviction. It would appear that in view of the lack of corroboration of SP4's testimony in court in the police report, coupled with her uncertainty as to the identity of her assailant in cross-examination

there is sufficient basis to conclude that her evidence differs in material and relevant particulars. These cannot, in my view, be dismissed as 'fanciful doubts'. There are a sufficient number of facts which are at variance, to warrant the question: Which version of events is true?

[22] This query was in fact put to SP4 in the course of cross-examination. She maintained that her evidence in court was the "correct" version and not her police report. However once again, no attempt was made by the prosecution to explain these inconsistencies.

[23] At the hearing of this appeal, the learned deputy public prosecutor submitted that such differences as appeared were not material. He went on to say that differences were to be expected, given that SP4 was giving evidence in court after a period of three years. *Pie Bin Chin v. PP* [1985] 1 MLJ 234 was cited in support of this:

> ... Forgetfullness and failure to recall exactly certain events, which did not seem to be important to the witness, do not necessarily shake his credibility or render other parts of his story unworthy of belief. Various persons are endowed with varying powers of cognition, attentiveness and perception, so that it is not uncommon for two witnesses to a common event to describe it in slightly differing versions ...

[24] However in this case the testimony of the complainant, SP4, on whom the greater part of the prosecution case rests, relates two substantially different versions of the same event. It is not an instance of SP4 forgetting and failing to recall certain events. There are more details in her testimony in court than in her first information report. Although it is not meant to be an "encyclopedia" setting out events from beginning to the end, the two versions in this case, have very little in common. No attempt was made to explain these differences. As stated by Ali J (as he then was) in *Mohamed bin Kasdi v. Public Prosecutor* [1969] 1 MLJ 135: "... No hard and fast rule can be laid down for determining the credibility or otherwise of a witness, but when a witness gives or makes two statements which differ in material particulars there must necessarily be ground for believing that he is not a truthful witness ...

How Did The Trial Court Treat SP4's Evidence?

[25] In *Tengku Mahmood v. Public Prosecutor* [1974] 1 MLJ 110, Raja Azlan Shah FJ (as His Highness then was) stated:

> ... a judge of fact should always test the complainant's evidence against the totality of his evidence and the probabilities of the case. Failure to do so does amount, in my view, to a misdirection and if it can be demonstrated that the trial judge had failed to do that, his conclusion as to credibility cannot, in justice be regarded as impeachable, much less unimpeachable. It would therefore be not just for an appellate court to regard itself as compelled to regard as conclusive his finding on the issue of credibility. The whole matter can be considered afresh. Further the graver the issue involved, and particularly when an allegation of corruption is in the air, the greater is the necessity for the appellate court to enquire whether the conclusion as to credibility is one that must under the law be regarded as, for all practical purposes, irrefragable ...

[26] This is of equal if not more significance in a case of rape, where the credibility of the complainant is crucial and the consequences to the accused, dire.

[27] And in *Sabarudin bin Non & Ors v. Public Prosecutor* [2005] 1 CLJ 466 the Court of Appeal approved the following passage from *Sarkar on Evidence* (15th edn) p 99 on the methodology of assessing a witness' evidence:

> The Act does not purport to lay down any rule as to the weight to be attached to the evidence when admitted, nor is any such rule possible for the proper appreciation of evidence is a matter of experience, common sense and knowledge of human affairs. 'For weighing evidence and drawing inferences from it, there can be no canon.
>
> Each case presents its own peculiarities, and common sense and shrewdness must be brought to bear upon the facts elicited in every case which a judge of facts in this country discharging the junctions of a jury in England has to weigh and decide (per Birch J in *R v. Madhub* 21 WR Cr 13, 19; *Mahendrapal v. State* AIR [1955] A 238 ...
>
> Neither the Evidence Act nor any other Act lays down any law governing the question which statement of a witness should be believed or should not be believed. The question depends upon so many circumstances that it is impossible to lay down hard and fast rules. The law has left it to the court to decide whether the evidence should be believed or not, and if believed, what weight

should be attached to it or what effect should be given to it. These matters have been left at the sound discretion of the court. When the legislature itself has left them at the discretion of the court, it is not open to the highest court to fetter the discretion by laying down hard and fast rules, because it would be tantamount to legislating (*Jwala v. State* AIR [1963] All 161 FB).

[28] In the instant case, the learned Sessions Court Judge did not consider or evaluate the differences in SP4's evidence at all. She adopted in toto SP4's testimony during examination in chief in court and did not evaluate it against SP4's responses in cross-examination and re-examination. Neither was SP4's evidence subjected to evaluation in the form of corroboration *vide* the earlier statements of SP4 or as against the evidence of other witnesses. The issue of SP4's credibility was not addressed in her grounds of judgment. SP4's evidence in examination in chief is therefore used as the factual basis for the finding of guilt against the accused. In her grounds of judgment the learned adjudicator states:

SP4 (mangsa) di dalam keterangannya menyatakan bahawa pada hari kejadian beliau telah pergi mencari kawan bernama Samy (SP8). SP4 bertemu SP8 dan sewaktu dalam perjalanan balik pada jam lebih kurang 12.30 pagi, tiba-tiba ada suara memanggil nama SP4 tetapi SP4 dan SP8 meneruskan perjalanan.

Namun demikian, tiba-tiba basikal yang dinaiki oleh SP4 telah di tendang dan SP4 telah di tarik masuk ke satu jalan lain. SP4 menyatakan pada hari kejadian ada 2 orang iaitu yang menendang basikal dan yang menarik SP4. Seorang lagi yang di katakan agak tua sedikit dan terus pergi dari tempat kejadian yang meninggalkan OKT sahaja bersama-sama SP4.

[29] It is evident that the learned Sessions Court Judge chose to accept SP4's assertion that her evidence in court was the "correct" version of events. However it is the failure to consider or address these substantive inconsistencies in the evidence that warrants a consideration of whether an error of law has been occasioned resulting in a substantial miscarriage of justice in convicting the accused on the flawed evidence of SP4.

[30] The failure of the learned Sessions Court Judge to address her mind to the anomalies in the evidence of the chief prosecution witness, SP4 coloured her approach to the issue of the credibility of this witness.

The Evidence Of Other Witnesses

[31] If I am incorrect in my conclusion that SP4's evidence is inherently flawed, and in fact her contradictions can be construed as minor discrepancies that have arisen as a consequence of the vagaries of time, then the issue of the corroboration of SP4's evidence in court by other witnesses remains to be considered. I say this because corroboration of SP4's evidence should only arise if she is in the first place a creditworthy witness. The testimony of an independent witness ought not to be used to aid or corroborate the evidence of a witness who is herself not credible.

[32] As stated in *Aziz bin Muhammad Din v. PP* [1997] 1 CLJ Supp 523 at p. 541:

> Lord Hailsham has expressed a similar opinion in the English House of Lord's case of *DPP v. Kilbourne* [1973] 1 All ER 440 when he said at page 452:
>
> > Corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible. If his evidence is not credible, a witness's testimony should be rejected and the accused acquitted, even if there could be found evidence capable of being corroboration in other testimony. Corroboration can only be afforded to or by a witness who is otherwise to be believed. If a witness's testimony falls of its own inanition the question of his needing or being capable of giving, corroboration does not arise.
>
> Thus the essence of corroborative evidence is where one creditworthy witness confirms what another creditworthy witness has said (see *Yap Ee Kong & Anor. v. PP* [1981] 1 MLJ 144).

What Is The Rule Of Practice Regulating Corroboration In Malaysia?

[33] In *Aziz bin Muhamad Din v. Public Prosecutor* [1997] 1 CLJ Supp 523 Augustine Paul JC (as His Lordship then was) said with regards to the need for corroboration:

> … Generally in Malaysia there is no specific rule of law that requires the evidence of a witness to be corroborated except in the case of the evidence of a child of tender years under s. 133A of the Act. *However in certain types of cases, there is a rule of practice which requires evidence to be corroborated. This includes the evidence of a complainant in a case involving a sexual offence. Even in such cases*

a conviction based on uncorroborated evidence is not illegal. But the rule of practice regulates the manner in which uncorroborated evidence is to be treated, that is to say, the judge must warn himself of the dangers of convicting on such evidence. In saying that the warning must appear in the judgment or grounds of decision of the trial court though no particular form of words need be used, Seah SCJ in delivering the judgment of the Supreme Court in *Ng You Thai* [1987] 2 MLJ 214 said at 216:

> The warning as to the danger of convicting on uncorroborated evidence if the prosecution is relying on the testimony of an accomplice does not involve some legalistic ritual to be automatically recited by the trial magistrate, or that some particular form of words or incantation be used and if not used, the judgment is deemed to be faulty and the conviction set aside. There is no magic formula and no set words which must be adopted to express the warning. ... (emphasis added).

[34] In the instant case, it would appear that the prosecution relied on the evidence of SP8, known as Samy, and SP2, the doctor to establish that SP4 had been raped by the accused. In her grounds of judgment the learned trial judge appears to have relied on the evidence of these two witnesses as corroborating SP4's evidence although this is not specifically stated. Her recitation of the salient facts includes the version of SP4's evidence where she returns home with Samy when they are both accosted. The learned trial judge also relies on SP2, the doctor's evidence to establish the factum of rape. The issue is whether or not the evidence of these witnesses corroborated the fact that the accused raped SP4.

Evidence Of SP8, Known As 'Samy'

[35] Samy, SP8 whose real name is Manimaran a/l Vairana was called upon to testify by the prosecution. He was brought up from Simpang Rengam where he was detained at that time. His evidence was that he and SP4 were on their way home from Taman Sri Kriang (Again there was no explanation as to the location of Taman Sri Kriang and whether SP4 and Samy had gone there to visit Haridas, as SP4 said.) at about 12.30am that night. Samy stated that he was riding a motorcycle and that SP4 was on a bicycle. According to him, the accused came up to both of them and asked Samy what time it was. The accused then hit him. He says that he immediately left on his motorcycle and when he turned to look back, he could no longer see SP4.

[36] Samy said in evidence that SP4 and he were stopped near some shops and that around the shops was an oil palm plantation. On the photograph, exh. P1D, he pointed out the place of the altercation as having taken place at or near some shops. These shops were opposite the small road leading into the oil palm plantation. It will be recalled that SP4 had testified in court that the incident took place on the opposite side of the highway near the small road at the location marked 'X'. Samy then went on to state that he did not know what happened to SP4 after that because he ran away. He next saw her the following morning.

[37] Taken as a whole, Samy's evidence corroborates SP4's evidence in part, namely that they were both returning home when they were stopped by the accused and he was hit. However, grave inconsistencies still remain, that Samy's evidence does not clear up.

(a) Samy does not recount the existence of another man, nor that SP4's bicycle was kicked and that she was dragged away while he was being hit. He merely says that he was hit and that SP4 disappeared;

(b) The location of the incident is also at odds with what SP4 said. SP4 marked a point 'X' opposite the shops where she said Samy and she were stopped and she was dragged away into the plantation. However Samy maintained that he was hit near some shops opposite the point marked 'X' by SP4. SP4 did not say in her evidence that she was dragged across the highway to the oil palm plantation on the other side of the shops;

(c) Samy maintains that he did not know what happened to SP4 after that.

[38] Samy's evidence does not therefore corroborate SP4's evidence in respect of the rape, or even of any form of abduction that night, *albeit* by the accused or anyone else. He did not recall the presence of any third person. The inconsistencies in SP4's evidence in relation to the location and nature of the events prior to the rape, the kicking of her bicycle, and her abduction by the unknown third man remain unresolved. Samy's evidence only served to corroborate SP4's evidence in court that he, Samy, was hit by the accused.

Medical Evidence – Does It Corroborate The Factum Of Rape?

[39] SP4 was taken for a medical examination to the Kuala Lumpur Government Hospital almost two days after the incident, on 18 August 2002 at 4pm. In complete disregard of the need to preserve material evidence, the police had on the morning after the incident, apparently instructed SP4 to go home and have a bath before coming back to make her police report.

[40] Her examination was conducted by a medical officer who was in training to become a specialist in Obstetrics & Gynecology. It was not adduced in the course of evidence that SP2 possessed the necessary expertise to examine rape victims and the methodology to be followed in the taking, labeling and transporting of samples for forensic examination. The doctor, SP2 stated in evidence and in his report that he noted external injuries as follows:

(i) A small abrasion at the bridge of SP4's nose;

(ii) An abrasion wound at her right hip;

(iii) Two superficial abrasion wounds on her right hand.

[41] These injuries are consistent with assault, but can also occur from injuries such as falling off a bicycle as noted by SP2. It is noteworthy that SP4 appeared to have suffered no scratches or injuries on her back as would be expected from being forced to lie on her bare back in a plantation.

[42] More significantly SP2 noted 3 fresh tears at 5-7 o'clock and 9 o'clock positions and a fresh tear measuring 2 millimetres at the posterior fouchette.

[43] The doctor described a fresh tear as follows: "... I mean the tear is fresh and raw edges with some amount of bleeding casually can still be noticed of the result on injury ..."

[44] He did not give a time frame as to when the fresh tears he noted came about.

[45] SP2 went on to say that there were multiple causes for the tears, which would include any kind of fall, or penetration by a blunt object. In cross-examination he said that the injuries were consistent with penetration with a blunt object which could be the penis of a man, but that he could not be sure and would only be certain:

> after all the results of the investigation were done, like vaginal swab for spermatozoa or any other DNA tests done on her.

[46] In view of his express qualification that he could not be sure that the penetration was by the penis of a man until all the results of the investigation were done, his evidence is equivocal. At best it can be said that it corroborated the factum of rape, but not that the accused was the man perpetrating the rape. This is borne out by *Aziz bin Muhamad Din v. PP* where it was said that:

> ... However, on a charge of rape where consent is irrelevant, medical evidence showing any fresh tear in the hymen is sufficient to corroborate the evidence of the victim on the factum of rape.

[47] In the instant case the age of the tear has not been confirmed with any certainty, save that it was a fresh tear. Neither was any evidence adduced to the effect that SP4 was or had been a virgin. The medical evidence does not rule out the possibility of penetration having occurred prior to or after the times stipulated in the charge, namely before 7.30pm on 16 August 2002 and after 0300 on 17 August 2002, or that penetration was within those hours but perpetrated by someone other than the accused.

[48] This latter issue as to whether it was in fact the accused who raped SP4 could have been resolved or corroborated by the use of the results from the chemical forensic analysis, but this was not done.

Chemical Forensic Analysis

[49] The record of evidence shows that samples were taken from SP4 by SP2 and were sent to the Chemistry Department (Jabatan Kimia) for evaluation. In this context it is noteworthy that no samples appear to have been taken from SP4's or the accused's clothing from that night. Neither was the victim asked to surrender her clothing for the purposes of forensic analysis when she went to make a police report on the morning of 17 August 2002.

Instead she was asked to have a bath before making a police report. As a consequence of this misinformed and unfortunate direction, it is likely that material evidence was destroyed rather than preserved.

[50] Although SP2 gave evidence in court he was not asked nor was evidence led as to precisely what samples were taken, apart from the vaginal swab for spermatozoa and in SP4's evidence, nail cuttings. SP2 did however confirm that the samples he took were sent by the Investigating Officer, Chief Inspector Rogayah bt. Rosli, SP9, for analysis to the Chemistry Department (Jabatan Kimia).

[51] The prosecution chose not to produce the results of this all important analysis. The prosecution merely advised that it had served the chemist's analysis on the defence and offered the chemist as a witness. This lacuna in the case is worsened by SP9's evidence on the subject. In the course of her evidence, SP9 said:

> 12 September 2002 saya hantar barang kes ke Jabatan Kimia. Hantar 5 sampul surat daripada Hospital Kuala Lumpur. Saya ada hantar barang kes darah suspek. Kalau tidak silap pada 24 September 2002. Keputusan barang-barang yang di hantar ialah negatif.

[52] And in cross-examination:

> Saya beri sample darah suspek untuk ujian DNA dan keputusan negatif **yang saya faham "negative" tidak ada persamaan dengan swab yang di ambil di Hospital Kuala Lumpur dipadankan dengan darah suspek.** (emphasis added).

[53] From SP9's evidence therefore, two important matters are brought to the fore. When she said that the results of the forensic analysis were negative, it was a possible and even plausible conclusion that there was no useful sample available to procure a result. But her evidence in cross-examination raises far more serious queries. By clarifying that negative means that there was no match between the vaginal swab taken from SP4 and the accused's blood sample, a very real possibility arises that there could have been a match with some person other than the accused. This is because an attempt to match SP4's sample with that of the accused could not have been undertaken unless there was sufficient material available from the vaginal swab or other

samples to be matched against the blood samples from the accused. And the result of such testing was that the samples from SP4 did not match the samples from the accused. In other words, despite SP4's allegation that the accused had raped her in the manner described in her evidence, no DNA of the accused was found on or in SP4. But this did not discount the possibility that there was DNA in the samples that matched a third party/ unknown person. The identity of this man was not addressed adequately or at all throughout the trial. In fact the only evidence on this subject was given by the Investigating Officer, SP9, who said that she had made investigations in respect of another man. The result of these investigations were that SP4 did not recognize the man and neither did the accused. SP9 had no further information on this unknown man. All in all, such a cursory investigation was of no aid whatsoever to establishing the truth in this case.

Consequences Of The Failure To Produce The Chemical Analysis Report

[54] The prosecution submitted before the Sessions Court that as they had served the DNA report and offered the chemist as a witness, no adverse inference should be drawn under s. 114(g). The defence contended to the contrary. Similar submissions were advanced at the hearing of this appeal. The respondent maintained that even without this report, there was sufficient evidence from SP4, SP8 and SP2 to show that SP4 had been raped by the accused.

[55] In my view, this forensic chemical report was of considerable significance because it could have either corroborated the evidence of SP4 or shown whether the accused or an unknown third party was involved. The report in this case could have easily been produced. If the chemist had bqen called, his evidence may have either confirmed the accused as SP4's assailant, or would have thrown doubt on the role allegedly played by the accused in the incident. Unfortunately, the chemist was not called as a witness. He was merely offered to the defence. I am of the view that he ought to have been called to enable prosecution to make out its case. Merely offering him to the defence left gaps in the prosecution case. The attendant result was that it could not be said that the prosecution had discharged its burden of proof.

Section 114(g) of the Evidence Act 1950 should, in these circumstances, have been drawn. The failure to do so in the court below is an error of law that has occasioned a miscarriage of justice.

[56] As a consequence of the failure to produce this wholly relevant evidence, the issue of whether the accused raped SP4 remains unresolved. The failure to produce the report is fatal to the prosecution's case.

[57] One other issue that arises from the negative results of the match between the accused's blood sample and those taken from the complainant, SP4, is why no effort was made to procure samples from Samy or Haridas whom SP4 had visited until 10pm or even the unknown man whom SP9 says neither SP4 nor the accused recognized. Could any of these others have produced samples that matched the samples taken from SP4? These possibilities were not discounted.

[58] In conclusion therefore, on the issue of corroboration of SP4's evidence by independent witnesses, neither Samy nor SP2 is able to corroborate SP4's evidence/claim that she was raped by the accused.

Consequences Of The Lack Of Corroboration Of SP4's Evidence From The Forensic Analysis, Her Police Report And SP8's Evidence

[59] While it is appreciated that small contradictions on non-material facts cannot form the basis for the rejection of an otherwise credible witness, in the instant case, there are so many contradictions and unanswered queries, that on a consideration of the totality of the evidence, one is left in doubt as to where the truth of the matter lies. The evidence of the complainant, SP4 cannot be described as "credible". As the credibility of SP4 was not reinforced by the other evidence made available by the prosecution, her testimony ought, with respect, to have been rejected by the learned trial judge. Her failure to do so warrants interference by this court. (See *Ab Malek bin Atan v. Public Prosecutor* [2002] 6 CLJ 405).

[60] In this case on these facts, the learned trial judge decided that defence ought to be called. A "maximum evaluation of the evidence" does not appear to have been undertaken by the court to ascertain that all the ingredients of the offence had been clearly

made out prior to calling for defence as required in *Looi Kow Chai v. PP* [2003] 1 CLJ 734. Given the totality of the evidence at the close of the prosecution's case, it was not possible to conclude with any reasonable basis that SP4 had been raped by the accused. Notwithstanding this, defence was called and this remains to be considered.

Defence

[61] The accused's evidence was that on the evening and night of 16 August 2002 he was with three friends drinking beer at a small restaurant. The location of this restaurant as borne out by SP8, Samy, was opposite the palm oil plantation where SP4 claimed that she had been raped. The accused said that he was in the restaurant at 12.30am when Samy, his younger cousin brother came to meet him in the restaurant. SP4 was with him.The accused asked Samy where he had come from. Samy informed him that he had gone to another 'taman' and was returning from there, when the accused's friends informed him that SP8 had been distributing/dealing in drugs. According to the accused he hit his cousin brother because of this information and after this SP8 went home, which was near the shops. The accused went back to drinking his beer and finally went home at about 1 in the morning. The accused confirmed that when Samy came to the restaurant he was with a girl, whom he knew. The girl was riding a bicycle. However he said that when he slapped/hit Samy, the girl had disappeared from the vicinity. He did not know where she went.

[62] The evidence of the accused as set out above was not contradicted in cross-examination. He denied that he had slapped/hit Samy so that SP4 would be left, according him an opportunity to rape her. In any event in order to rape SP4 he would have had to forcibly drag her across the highway to the small road opposite and then into the plantation. There has been no suggestion anywhere in the evidence that SP4 was dragged across a highway and then taken into an oil palm plantation. Such a *modus operandi* does not seem likely as the altercation appears to have taken place in the vicinity of shops which were lit and therefore could be viewed by other persons nearby. In any event it is SP4's evidence that she was dragged away by another man, whom neither the accused nor Samy have mentioned.

[63] The accused was asked whether he smoked cigarettes to which he replied that he did. He was then asked whether he used a lighter. He responded that he did not like to use lighters because they were easily lost and that he preferred to use matches which were easier to use and were cheap. He did however say that he had used a lighter before. This line of questioning came about because of SP4's evidence that the man who raped her had used a lighter to show her his penis.

[64] The accused also stated that he had heard that Samy was dealing in drugs from his friends six months prior to this date. However 16 August 2002 was the first occasion when he slapped/hit Samy because he was extremely angry with him. The accused lived in a house opposite to Samy's and saw him frequently.

Decision Of The Sessions Court

[65] On these facts, the learned trial judge concluded that the defence had failed to raise a reasonable doubt in the face of the prosecution case which had proven its case beyond any doubt whatsoever. In arriving at her decision, as referred to earlier, the learned trial judge accepted SP4's evidence in toto as given in court. As for the accused's defence, it was categorized as a bare denial which could not be believed for the following reasons:

(a) The accused had admitted that he had used a lighter before and was a smoker. Therefore SP4's evidence that the man who raped her used a lighter was borne out and accepted as true because the accused had used a lighter before. This conclusion ignored that portion of the accused's evidence where he said that he used matches because he preferred them and they were cheaper;

(b) The accused's evidence that he had slapped Samy on the night of the incident because Samy returned late could not be believed because the accused had not hit Samy on any occasion prior to this, despite knowing from as long as six months previously that Samy was involved in dealing with drugs. Therefore the accused's evidence that he hit Samy and that Samy then ran away was difficult to accept.

[66] The rejection of the accused's evidence and the acceptance of SP4's evidence in toto does not appear to be grounded on any reasonable basis. Other than SP4's flawed evidence, there appears to be positive evidence possibly excluding the accused's involvement which was not produced before the court. The learned trial judge failed to consider:

(a) Whether there were material contradictions and inconsistencies in the evidence of SP4;

(b) Whether such infirmities were material to the facts in this instant case such as to throw doubt on her credibility;

(c) Whether there was other independent evidence corroborating SP4's evidence;

(d) Whether the failure by the prosecution to adduce in evidence the forensic chemical analysis warranted invoking s. 114(g) of the Evidence Act 1950;

(e) Whether a *prima facie* case had been made out;

(f) The merits of the accused's defence adequately

[67] If this had been done, it is unlikely that a decision to convict the accused would have been reached. In these circumstances, the conviction of the accused appears to have been occasioned by a failure of justice, warranting interference at the appellate level.

[68] Prior to arriving at this decision I considered the caution sounded by the Federal Court in *Looi Kow Chai v. PP* [2003] 1 CLJ 734 where it was said that "An appellate court should be slow to interfere with the finding of fact by a lower court as an appellate court does not have the advantage of seeing and hearing the witnesses and therefore of assessing their credibility ..."

[69] However in the instant case, the learned trial judge did not have the "audio-visual" advantage of SP4's evidence enabling her to weigh and consider her evidence against that of the accused. This is because the evidence of the witnesses SP1 to SP7 were heard by another judge. Only the evidence of SP8, SP9 and the accused was heard by the learned trial judge who decided on this issue finally. Therefore the adjudicator in the court below, in so far as SP4's evidence was concerned, was very much in the same position as this court, in that her assessment of such evidence was based on the recorded transcript.

Conclusion

[70] In all the circumstances of this case as set out above, it would be unsafe to act on SP4's evidence which is inherently flawed. Even if I am incorrect in this respect, the other witnesses called to corroborate her evidence did not corroborate the fact that she was raped by the accused. In this respect the failure to produce the forensic chemical analysis was fatal the prosecution's case. The accused in his defence did not put forward a ritualistic 'bare denial' but set forth his own version of events that required mature and unbiased consideration and evaluation.

[71] Accordingly it is my view that the finding of guilt and the conviction of the accused by the learned trial judge was wrong. I therefore set aside the order made by her and acquit and discharge the accused.

Appeal allowed.